Both PW1 and PW2 in evidence were adamant about the fact that their vessel VIRA was stationary and that at no time had it moved from its moorings and PW2 in particular said that he saw the LESNOY approaching, he heard the impact and when he went on the deck he saw the said vessel stationary and after a while move away from the VIRA. They were both subjected to a lengthy cross-examination but they were not shaken and their evidence not rebutted. I was impressed with the manner in which they gave their evidence. They were witnesses of truth.

Now in the case of a collision in daylight between a ship under way and another which is proved or admitted to be lying at anchor in a proper place, the burden is upon the former to show that she was not at fault, for when a steamship runs down a vessel at her moorings in broad daylight, that fact is by itself *prima facie* evidence of fault — *Marsden*, British Shipping Laws, Collision at Sea, Vol. 4 at page 38. Again in the *"City of Peking"* v. *The Compagnie Des Messageries Maritimes*,[1] the Law Lords held that where a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *prima facie* evidence of fault, although such steamer is well equipped, and both officers and men are shown to have been at their posts and on the lookout. There was nothing in the evidence to suggest who was in charge of the LESNOY at the time of the collision or whether there was anybody on board the LESNOY. All we do know is that the Chief Engineer of the VIRA said in evidence that after the collision three people from the LESNOY came to his ship.

The defendants did not call a single person on board the LESNOY to give evidence as to whether or not the ship had moved and if it had, how it moved and whether it moved on its own steam and if so why or whether the vessel had dragged its anchor.

The defendants have failed to discharge the onus. I find as of fact that the vessel LESNOY was solely to blame for the collision. Judgment to plaintiff. Damages are to be assessed by the Registrar. Costs to the plaintiff.

Claim allowed.

Solicitors: *Drew & Napier; Rodyk & Davidson.*

MALAYSIAN REPORTS

MICHAEL BEN ANAK PANGGI v. PUBLIC PROSECUTOR

[A.C.J. (Yusoff J.) October 24, 1977 & March 9, 1978]
[Kuching — Criminal Appeal No. K. 8 of 1976]

Criminal Law and Procedure — Power of appellate court — Appellate court at liberty not to order a re-trial by reason of misdirection — Criminal Procedure Code (F.M.S. Cap. 6), s. 316(b)(ii) — Penal Code (F.M.S. Cap. 45), s. 379 — Courts of Judicature Act, 1964, s. 66(1).

Constitutional Law — Disqualification by court barring applicants from seeking future election to Dewan Negeri — Disqualification not automatic — Whether unconstitutional and in contravention of art. 19 of Sarawak Constitution — Sarawak Constitution, arts. 17(1)(e), 18(2)(a) & 19 — Federal Constitution, arts. 8, 48(1)(e) & 53.

Federal Court — Reference to — Scope of s. 66 of the Courts of Judicature Act, 1964.

The applicant in this case was convicted under section 379, Penal Code which conviction was affirmed by the High Court on appeal and his sentence varied from one of ten months' imprisonment to a fine of $2,000. He contended that the appellate court determined there were misdirection on points of law by the lower court. The question posed was therefore whether the appellate court could, in view of section 316(b) of the Criminal Procedure Code disagree to alter the finding or quash the conviction or order a re-trial because of the history of the case. It was also argued that the direct result of the sentence would be to disqualify the applicant from continuing to be a member of the Dewan Negeri. This, he argued, contravened article 19 of the Sarawak Constitution. The applicant sought to have the above questions of law referred to the Federal Court under section 66(1) of the Courts of Judicature Act.

Held: (1) questions of law which may be referred to the Federal Court under section 66 of the Courts of Judicature Act should not be questions that are of personal interest only to the accused or the Public Prosecutor. The questions should be of public interest so that references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court;

(2) it is within the power exercisable by an appellate court under section 316(b)(ii) of the Criminal Procedure Code not to order a re-trial by reason of a misdirection, depending on the evidence and circumstances in each case, particularly when such misdirection was not fundamental;

(3) the applicant was not automatically disqualified and did not cease to be a member of the Dewan Negeri upon his conviction. A question in the council had to be raised on such disqualification before the Dewan Negeri could take a decision to disqualify him and determine his tenure of seat;

(4) the court in an appropriate case, is empowered to impose a sentence that would disqualify a person from membership of parliament or state legislature without contravening article 53 of the Federal Constitution or article 19 of the Sarawak Constitution;

(5) an award of different sentence for the same offence according to the circumstances of each case does not infringe the principle of equality before law.

Cases referred to:-

(1) *Ibrahim bin Haji Karim* v. *Public Prosecutor* [1976] 1 M.L.J. 280.

(2) *Tan Yin Yen* v. *Public Prosecutor* [1973] 2 M.L.J. 143.

(3) *Nadarajah* v. *Public Prosecutor* [1969] 1 M.L.J. 108.

(4) *R.* v. *Johnson* [1961] 3 All E.R. 969.

(5) *Tengku Mahmood* v. *Public Prosecutor* [1974] 1 M.L.J. 110.

(6) *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155, 178.

(7) *Fan Yew Teng* v. *Government of Malaysia* [1976] 2 M.L.J. 262.

(8) *Fan Yew Teng* v. *Setiausaha Dewan Ra'ayat & Ors.* [1975] 1 M.L.J. 40, 42.

(9) *Public Prosecutor* v. *Ooi Kee Siak & Anor.* [1971] 2 M.L.J. 108.
(10) *Public Prosecutor* v. *Fan Yew Teng* [1975] 1 M.L.J. 176.
(11) *Public Prosecutor* v. *Datuk Harun Idris (No. 2)* [1977] 1 M.L.J. 15.
(12) *Public Prosecutor* v. *Tengku Mahmood Iskandar & Anor.* [1973] 1 M.L.J. 128.
(13) *State of Punjab* v. *Ajaib Singh* A.I.R. 1953 S.C. 10, 16.
(14) *Siba Prasad Moda* v. *State of Orissa* A.I.R. 1951 Orissa 259.

CRIMINAL APPEAL.

J.C. Fong for the applicant.

Abdul Hamid bin Mohamed Yusoff (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yusoff J.: This is a motion filed by Michael Ben ak. Panggi (applicant) to have two questions of law referred to the Federal Court under section 66(1) of the Courts of Judicature Act, 1964 (the Act). He was convicted under section 379 of the Penal Code (Cap. F.M.S. 45) which conviction was affirmed by the High Court on appeal and his sentence varied from one of 10 months' imprisonment to a fine of $2,000. His main contention was that this conviction and sentence cause his disqualification as a member of Dewan Undangan Negeri Sarawak.

The two questions are:

1. Whether misdirections of law and fact by the court of first instance found sufficient by the appellate court for serious consideration of an order of retrial, can be ignored because of the history of the case (involving two trials and two appeals) and the original conviction sustained or affirmed.
2. Whether a sentence directed not to punishment, not to deterrence, not to rehabilitation but exclusively to disqualifying an accused person from continuing to be a member of Dewan Undangan Negeri Sarawak, and from standing for an elective office, is unconstitutional and in breach of the privileges of the said Dewan.

In order to have a question referred to the Federal Court under section 66(1) of the Act, three elements must be satisfied, viz.:

(1) It must be a question of law of public interest;
(2) which has arisen in the court of appeal; and
(3) the determination of which by the judge has affected the event of the appeal — see *Ibrahim bin Haji Karim* v. *Public Prosecutor*.[1]

In *Tan Yin Yen* v. *Public Prosecutor*[2] the Federal Court ruled that:

"... questions of law which may be referred to us under section 66 should not be questions that are of personal interest only to the accused or the Public Prosecutor, but should be questions that are of public interest... so that references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court."

On the first question in the motion, it was argued that the appellant had raised questions regarding misdirections on points of law by the trial magistrate in the lower court, and the appellate court determined that there were such misdirections. Two elements under section 66(1) of the Act, having been satisfied, it was further argued whether the appellate court could in view of section 316(b) of the Criminal Procedure Code (F.M.S. Cap. 6), disagree to alter the finding or quash the conviction or order a retrial because of the history of the case. It was also contended that because different judges have in similar situations, taken dissimilar courses of action, the question has become a matter of public interest — section 66(6)(a) of the Act. The learned counsel relied on two cases: *Nadarajah* v. *Public Prosecutor*[3] and *R.* v. *Johnson*[4] to support his argument.

What I could discern from this argument is that there is a conflict of judicial decision on the interpretation and application of section 316(b) of the Criminal Procedure Code. The section provides that:

"316. At the hearing of the appeal the judge, may if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —

(b) in an appeal from conviction or in an appeal as to sentence

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried or committed for trial; or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;"

In my judgment when dismissing the appeal by the applicant I held that there had been two instances where the trial magistrate misdirected himself, firstly on the corroboration of the District Officer's evidence and secondly on the impeachment of the defence witness's (DW4) evidence, but having regard to the history of the case, wherein the applicant had undergone two previous trials and two appeals, I considered that it would be wrong to order retrial. That decision was reached after having regard to other evidence not affected by the misdirections.

In my view, there is no conflict of judicial decision for the appellate court to adopt that procedure. It is within the power exercisable by an appellate court under section 316(b)(ii) of the Criminal Procedure Code not to order retrial by reason of a misdirection, depending on the evidence and circumstances in each case, particularly when such misdirection was not fundamental.

In *Nadarajah* v. *Public Prosecutor, supra,* the court had convicted the appellant on a charge of robbery. The learned President had misdirected himself on the quantum of proof. It was found that it would be impossible to say with certainty that the President would have convicted the appellant if he had not misdirected himself. The misdirection was fundamental and the conviction was quashed.

In *R.* v. *Johnson, supra,* the appellant was charged with robbery with violence. The trial judge had misdirected the jury on the burden of proof. This misdirection was found to be absolutely fundamental and the conviction quashed.

In the present case, I found that the misdirections by the learned magistrate in both instances were not fundamental. In the first instance he said in his

ground of decision that he was satisfied with the District Officer's credibility and the corroboration was only incidental. In the second instance the magistrate found that the witness DW4's evidence was contradictory. From the notes of evidence there is such a contradiction of his evidence and that of the accused on essential points. It was reasonable for the magistrate to exclude his evidence.

By virtue of section 167 of the Evidence Act, 1950, an appellate court is at liberty not to order a retrial by reason of improper admission or rejection of evidence and to review the whole evidence in the case to see whether independently of the evidence objected to and admitted or rejected, it ought not to vary the decision of the lower court. In my opinion this was a proper case not to order retrial. This procedure was followed by Raja Azlan Shah F.J. in *Tengku Mahmood* v. *Public Prosecutor*[5] and very recently by the Federal Court in *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor*[6] where the court ruled that:

"Earlier we stated that in our view the judge should not have allowed reference to the two cheques P44 and P45; but in our view, even apart from these two cheques, there was enough evidence to support the judge's finding of guilt."

In these circumstances I hold that there is no conflict of judicial decision in this case and the first question in the motion fails.

On the second question in the motion, the learned counsel for the applicant contended that the reason given for such sentence is an act of interference by the court on the privilege of the Dewan having regard to Article 19 of the Sarawak Constitution and that such decision is in conflict with that of Chang Min Tat J. (as he then was) in *Fan Yew Teng* v. *Government of Malaysia.*[7] It was also contended that the sentence imposed was an infringement of Article 8 of the Federal Constitution.

It was conceded that in passing such sentence, the disqualification envisaged by the court was to bar applicant from seeking future election to the Dewan Negeri. But it was argued that on construing Articles 17(1), 18(2) and 19 of Sarawak Constitution, the direct result of the sentence would be to disqualify applicant from continuing to be member of the Dewan. This, it was further argued, contravened Article 19 of the Constitution.

Now, Article 17(1)(e) of Sarawak Constitution imposes disqualification of an elected member if he has been convicted of a criminal offence and sentenced to not less than one-year imprisonment or a fine of not less than $2,000 and has not received a free pardon. Article 18(2)(a) declares that an elected member shall vacate his seat if he ceases to be qualified for election as such member. And Article 19 provides that if any question arises whether a member has ceased to be qualified, the decision of the Council shall be taken and shall be final.

It is pertinent to note that the disqualification of the applicant under Article 18(2)(a) of Sarawak Constitution which in effect, is similar to Article 50 of the Federal Constitution, is not automatic. Mohamed Azmi J. in *Fan Yew Teng* v. *Setia Usaha Dewan Ra'ayat & Ors.*[8] says:

"the mere fact that a member of parliament has been convicted and sentenced to a fine of not less than $2,000 and has not received a free pardon does not render his seat vacant automatically in all cases under Article 50(1)... it is wrong to consider Article 48(1)(e) and 50(1) without regard to the provision of Article 53."

Article 48(1)(e) is also similar to Article 17(1) and Article 53 with Article 19 of Sarawak Constitution. I have no reason to question the validity of that decision.

The true construction of Article 18(2) and Article 19 is that, the applicant was not automatically disqualified and did not cease to be a member of the Dewan upon his conviction of an offence and sentence to $2,000 fine. A question in the Council has to be raised on such disqualification before the Dewan could take a decision to disqualify him and determine his tenure of seat. In the words of Chang Min Tat J. (as he then was) in *Fan Yew Teng* v. *Government of Malaysia, supra* —

"What Article 53 (Art. 19 Sarawak Constitution) requires is that the question should arise. How it arises and in what circumstances it is raised are not relevant for the purpose of this clause."

To sum-up and in answering the question posed by the appellant's counsel, I would say that the court in an appropriate case, is empowered to impose a sentence that would disqualify a person from membership of Parliament or State legislature without contravening Article 53 of the Federal Constitution or Article 19 of Sarawak Constitution. Such sentences have in fact been imposed by the courts in many cases. See — *Public Prosecutor* v. *Ooi Kee Siak & Anor.*,[9] *Public Prosecutor* v. *Fan Yew Teng,*[10] and very recently in *Public Prosecutor* v. *Datuk Harun Idris (No. 2).*[11]

It was also suggested that the sentence of the court is in conflict with that of Chang Min Tat J. (as he then was) in *Fan Yew Teng* v. *Government of Malaysia, supra.* That decision centered on the construction of Article 53 of the Federal Constitution which is *in pari materia* with Article 19 of Sarawak Constitution. Article 19 states:

"If any question arises whether the Speaker or a member of the Dewan Undangan Negeri has ceased to be qualified for appointment or election as such, the decision of the Council shall be taken and shall be final."

In his decision Chang Min Tat J. said:

"On this construction, I must necessarily go on to hold that this court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership or the corresponding right to the Dewan under the proviso to Article 53 to decide."

With due respect, it is very apparent that Chang Min Tat J.'s decision was taken out of context by the learned counsel. That case arose in different circumstances from the present. In that case, following the plaintiff's conviction of a criminal offence, and $2,000 fine, a motion was introduced in the Dewan Ra'ayat raising a question whether the plaintiff has become disqualified for membership of the House and that the question be referred to the Committee of Privileges. The plaintiff sought for declarations of the court that he had a right to exhaust his legal remedies before the Dewan could take a decision on his disqualification. In those circumstances Chang

Min Tat J. held that the court cannot interfere with the right of the Dewan Ra'ayat to decide the question of the plaintiff becoming disqualified from membership and the relief sought by the plaintiff was outside the jurisdiction of the court.

The present case is distinguishable in that the facts are different, a question has not arisen in the Dewan and that the decision of the court was not made with a view to preventing the Dewan from exercising its powers and privileges, or to disqualify the applicant if it is mindful to do so.

Lastly, it was argued that the sentence imposed by the court on the appellant was an infringement of Article 8 of the Federal Constitution, by reason that such sentence would result in his disqualification as member of Dewan Undangan Negeri whereas others who do not belong to the same class of persons as he would suffer only a fine.

To this argument I would only refer the learned counsel for the appellant to a passage in the book by Tun Mohamed Suffian entitled 'An Introduction to The Constitution of Malaysia' at p. 213 in which he says:

"Article 8 by clause (1) provides that all persons are equal before the law and entitled to its equal protection.... Today there is complete equality before the law, save as excepted by the constitution, and no Raja, Tengku, Tun, Tan Sri, Datuk or towkays may claim special treatment in the courts by reason of position or wealth."

In emphasising the same principle Raja Azlan Shah J. (as he then was) in *Public Prosecutor* v. *Tengku Mahmood Iskandar & Anor.*[12] referring to Article 8 said:

"That implies that there is one kind of law in the country to which all citizens are amenable. With us, every citizen, irrespective of his official status, is under the same responsibility for every act done without legal justification."

In the eyes of the court the applicant had committed a criminal offence and he was convicted, irrespective of his official status. In passing sentence on him the court must have a specific purpose in mind that is the public interest. The interest of justice must also be served, having regard to the nature of the offence, the character and circumstances of the offender. The sentence must also be a deterrent not only to applicant himself but to others like him. It was in the public interest and in the interest of justice that the sentence was passed after having considered all those factors.

An award of different sentence for the same offence according to the circumstances of each case does not infringe the principle of equality before the law. See — *State of Punjab* v. *Ajaib Singh.*[13] See also *Siba Prasad Moda* v. *State of Orissa.*[14]

As I have said earlier, the question proposed to be referred to the Federal Court would only serve the applicant's personal interest and for that reason leave is refused.

Leave refused.

Solicitors: *Reddi & Co.*

KANAGASABAPATHY v. NARSINGAM

[A.C.J. (Vohrah J.) May 19, 1978]

[Kuala Lumpur — Civil Appeal No. 36 of 1977]

Torts — Negligence — Failure to provide reasonably safe system of work — Fall from coconut tree — Volenti non fit injuria — Damages.

Labour Law — Master and servant — Toddy tapper falling from coconut tree — Failure to provide reasonably safe system of work — Damages.

The respondent who was employed by the appellant as a toddy tapper fell from a coconut tree and sustained injuries while engaged in the performance of his duties. The learned President of the Sessions Court found that the appellant was negligent in that he failed to provide a reasonably safe system of work and he awarded general damages of $6,500. The appellant appealed and on the appeal it was argued *inter alia* that the doctrine of *volenti non fit injuria* was applicable.

Held: (1) although the appellant was aware of the risks he did not consent to them and therefore the doctrine of *volenti non fit injuria* could not be applied;

(2) the learned President was correct in his finding that the appellant was negligent at common law as he had failed to provide a reasonably safe system of work for the respondent.

Cases referred to:-

(1) *Drummond* v. *British Building Cleaners Ltd.* [1954] 3 All E.R. 507.

(2) *General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180.

(3) *Monaghan* v. *W.H. Rhodes & Son* [1920] 1 K.B. 487.

(4) *Smith* v. *Baker* [1891] A.C. 325, 362.

CIVIL APPEAL.

G.T. Rajan for the appellant.

R.K. Nathan (*S. Kanagasabathi* with him) for the respondent.

Cur. Adv. Vult.

Vohrah J.: This is an appeal against the decision of the Special Sessions Court, Kuala Lumpur awarding damages in an action for negligence.

The action was brought by the respondent who was employed by the appellant as a toddy tapper. On January 13, 1973 the respondent whilst engaged in the performance of his duties as a toddy tapper fell from a coconut tree and sustained injuries. He claimed damages for these injuries which, he alleged, were sustained solely as a result of the negligence of the appellant.

The facts of the case appear to be as follows. The respondent had been an employee of the appellant since 1971. In the ordinary pursuit of his employment as a toddy tapper he tapped an average of 25 coconut trees twice daily. In order to tap each tree he had to climb it by way of steps cut into its trunk. On reaching the top of the tree he would stretch out a hand to grasp the foliage in order to haul himself up towards the crown of the trunk whereafter he would pour the toddy, already collected there in a pot attached to the spathe, into a container tied around his waist and then make his descent. Prior to the accident the respondent had on more than one occasion complained to the appellant of the slipperiness of the steps. His last complaint was made about one month before his fall. On this occasion he claimed he informed the appellant that the steps were slippery